SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1251

UNITED FOREST PRODUCTS CO., INC.,
Petitioner,

vs.

EARL R. BAXTER, WILLEYNE BAXTER, LYNN O. MUSE, RICHARD L. KING, and W. K. CASH,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT OF THE CASE

In excess of two million dollars is being held in the Iowa-Des Moines Bank subject to an order of the district court, which amount constitutes the purchase price of stock in the Baxter Lumber Company, sold under installment sale April 24, 1967. In addition, United Forest (the purchaser), has had exclusive possession of all of the assets and contracts of Baxter Lumber Company since February 13, 1967, and has retained all profits from that enter-

prise which at the time of the hearing on this matter in early December of 1967 amounted to $2,216,955.47 before taxes. (R. 353-5) Additionally, since both parties to this agreement have by legal action affirmed the agreement, Earl Baxter, Lynn Muse, Richard King and W. K. Cash (the sellers), are barred from entering into the manufacture of ammunition boxes in their former territory by a covenant not to compete. And finally, this leverage has been applied to the sellers of this stock without the necessity of security for attachment as provided by the law of Iowa.

The dilemma these sellers find themselves in occasioned the following terse comments by the court of appeals:

> "One reason plaintiff (United Forest) urged sequestering defendants' funds during the pendency of the claim was its concern for defendants' bankruptcy. Plaintiff's action in retaining the business sold and depriving defendants of the consideration during pendency of the litigation would almost guarantee this ominous result. *The law does not recognize such leverage in the hands of litigants.*" (A3) (Emphasis supplied)

And this condition which the court of appeals found, still exists to this date, because a stay of the mandate has been granted pending consideration of this writ.

The agreement between the parties, which is the basis of this lawsuit, provided for the immediate delivery of all the assets of the business to the purchasers without any impediments and without even a down payment for the shares of stock *except* purchasers agreed to (1) invest $500,000 capital, (2) pay off obligations of the corporation to Earl Baxter, the officers and to the Small Business Administration; and (3) make the installment payments promptly and complete the payments in approximately eighteen (18) months. The sole and only protection af-

forded sellers in exchange for these sweeping contractual benefits given to the purchasers was the following:

> "In the event of default of any payment provided for herein the sellers shall have the right to take possession of the company and operate the same. . . . If the default continues beyond the sixty day period, sellers may at their election in writing declare the contract forfeited and all sums paid hereunder shall be retained by sellers as liquidated damages." (¶ 16, Agreement for Sale of Stock, Appellant R., p. 124)

The trial court by accepting the installment payments under Rule 67 as a "deposit in court" effectively took away sellers' rights under the agreement while preserving all the rights to the purchasers without security as provided by the Iowa law of attachment. This deprivation of rights was one of the "irreparable harms" found by the court of appeals.

The United Forest petition would imply that the trial court has made findings of "substantial fraud" against these purchasers. This is a misleading representation of the trial court proceedings. Since this is a suit for damages, a jury trial is permitted and has been requested. The trial court has not and will not be called on to determine the facts with respect to the alleged fraud. The subjects noticed in hearings before the district court were:

> August 25 and 30, 1967. Application to Deposit (No testimony offered by applicants.)
>
> December 18-22, 1967. Motion for Disbursement of Funds and for Receiver of Baxter Lumber Company—made by sellers, Earl Baxter, et al.

Thus the issue of a preliminary determination of fraud was not properly before the court. Over repeated objections by sellers' counsel, United Forest read a deposition of Earl Baxter relating to an incident in the Bahamas which was

not even a pleaded issue at the time. (Much later United Forest amended its complaint to allege a separate action against Earl Baxter.) The trial court repeatedly stated that such findings were not "on the merits," to-wit:

> "I want to express this caution, however, that anything I say now should not be construed *in any way as the court's determination on the merits*, ..." (*Petition for Writ*, p. 7, R. 321)
>
> "I haven't decided the merits." (R. 310)
>
> "The case is not over. I'm not passing on it." (R. 313)
>
> "I'm not going to pass judgment on Mr. Baxter." (R. 313)
>
> "I want everyone to understand I have not the slightest idea what the damages are. . . ." (R. 324)
>
> "It doesn't mean that I will finally decide that he (Earl Baxter) shouldn't get a verdict." (R. 325)

Despite these repeated assurances, the district court's final order contained a reference to a preliminary finding of fraud. (Footnote 2, Petition for Writ; Supp. R., pp. 2-3)

The court of appeals decision is based on a conclusion that makes such finding completely irrelevant in that the situation presented required the adherence to the district court to the Iowa law of attachment under Rule 64.

The fact which this court should understand is that at this time, the money on deposit is still tied up and the sellers have no use of it whatsoever, not even interest. The mandate of court of appeals was stayed without bond pending petition for writ of certiorari to this court. Three of the sellers, Earl and Willeyne Baxter and Lynn Muse, owning 64% have not received one cent from the sale of their 64% interest in the spring of 1967. Roughly one-half of the purchase price payable to the other minority in-

terests has been deposited in court. And all of this was accomplished without security of an attachment bond as provided by Iowa law. These sellers are in a desperate financial condition due to the acts of the purchasers.

Finally, the petition for writ of certiorari would lead the court to believe that United Forest would be left without a remedy if denied the right to deposit in court. The record in the district court abounds with references to the remedy available to the purchasers' attachment under bond:

> "To the Plaintiff: 'Why should you circumvent the usual route of attaching. . . . If he thinks there is a jeopardy of collection he has to under our law use the attachment procedure and post a bond. Why shouldn't your client do that?' " (R. 45)
>
> "First, that normally under our procedure—I think it is under Rule 64, Plaintiff would follow the Iowa procedures of attachment and post a bond accordingly and attach the fund that he would have to deposit under this contract to secure any judgment that he might possibly ultimately get." (R. 57)
>
> "And attorney fees are due if there has been a wrongful attachment." (R. 80)
>
> Order of August 30, 1967: (R. 85) ". . . plus an additional sum of $44,800 which additional sum shall be held as security for such right of action, if any, as the individual Defendants might have under Iowa law for wrongful attachment, which right of action is asserted by the individual Defendants and specifically denied by the Plaintiff."
>
> "Of course to begin with, let's accept the fact that by attachment, they could have tied it up. . . So if I had turned down their remedy, they could have just merely incurred a lot more expense in getting an attachment bond and tying it up . . . So, all I said was 'We have an awful sick chicken on our hands, and the more

> money that is spent, the more precarious the position gets.' *So that is the only reason I granted the relief,* and I think you are aware of that." (R. 309)
>
> "... I think we all have to concede Mr. Arthur Davis is correct; and in the remedy I gave last fall, it is an usual remedy . . . It is an extraordinary remedy. . . ." (R. 319)
>
> "This is an extraordinary remedy, and as you lawyers know, the Iowa court sets out certain grounds that you have to have before you can get an attachment, and it sets out the bond requirements." (R. 324)

The amount required by the court in the first hearing as security for possible attachment damages, "if any," was the sum of $44,000 which sum has at the present time dissipated to the point that if the court required United Forest to pay over the balance due under the contract with interest as provided by contract, there would be only some $20,000 for damages. The Iowa law of attachment requires a bond double the amount attached, or four million dollars for the entire amount. Any portion of the sales price can be attached by following the proper procedures and posting adequate security.[1]

In summary, the facts alone would allow this court to conclude that certiorari should not be granted; in that:

(1) Sellers have been deprived by the district court of their business, the payments therefor, and the contractual right of forfeiture without adequate security.

(2) United Forest has an available remedy in attachment.

(3) Further delay in the case can only prejudice sellers.

(4) The issue involved is preliminary only and will not affect the merits of the controversy.

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1. United Forest represented to the court in August, 1967, that it was unable to post attachment bond. (R. 58-9)

ARGUMENT

1. The appealability issue does not present grounds for review. The fact that the matter of sequestering funds is a "collateral issue" can be firmly established by the proceedings in the trial court since appeal was taken:

(1) Depositions of at least nine witnesses in Los Angeles, San Francisco, Shreveport, Newark, Joliet and Texarkana.

(2) Extensive interrogatories, objections thereto, rulings and answers.

(3) Broad motions for productions and orders allowing same together with extensive examination of accounting records.

(4) Amendment to complaint adding new items of damage and several new divisions.

(5) Answer to amended complaint with newly stated counterclaims for damages.

(6) Two additional applications for depositing installments.

Without question, the deposit of funds was collateral, and petitioner does not seriously question that determination by the court of appeals.

The first allegation made by petitioner is that the court of appeals "rendered a decision in conflict with the applicable decisions of this court, those of other courts of appeals (citing one case), and even its own prior decisions (citing two cases)." Yet, in argument developing this allegation, petitioner weakly admits that the court of appeals placed principal reliance on *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541.

Cohen has been quoted by courts of appeals no less than 50 times since it was decided, and each time the court attempted to follow the *Cohen* rule, sometimes granting appeal, sometimes denying appeal. It would be absurd to assert that this court should review each case to make certain the rule was being correctly applied. The Eighth Circuit has cited the rule at least twice in previous rulings and has denied appealability.[2] Apparently petitioner takes the position that the court of appeals did not follow *Cohen* because it permitted an appeal, since all of the cases cited in its brief denied appeal. *But COHEN allowed appeal.*

In attempting to create a conflict in the circuits where none exists, petitioner has totally failed to cite a single instance where a court of appeals has taken a different view in an attachment case. The truth is that there is no conflict—the issue decided by the court of appeals with respect to appealability is one of first impression with the possible single exception of *Cohen* itself. The argument made by this court in that case is particularly applicable to the facts here:

> "But this order of the district court did not make any steps toward final disposition of the merits of the case and will not be merged in final judgment. When the time comes, *it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable,* will have been *lost, probably irreparably.*" 337 U.S. 541 at 546 (Emphasis supplied)

Cohen related to a state statute requiring security. So does this case. In *Cohen* the district court had ruled against applicability of the state statute and did not require the statutory security. This case involves an identical issue. The court in *Cohen* stated that after trial on the

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2. *Bohms* v. *Gardner,* (8th Cir. 1967) 381 F. 2d 283; *Florida* v. *United States,* (8th Cir. 1960) 285 F. 2d 596 (cited by petitioner).

merits, the rights conferred by statute would be lost. The same is true here. Finally, the court in *Cohen* found that there "probably" could be irreparable harm. We will now turn to this issue.

The issue of "irreparable harm" was thoroughly aired in the court of appeals. Briefs of both parties announced the rule that review is to be granted where irreparable injury will accrue to an aggrieved party. On this issue, these sellers submitted that they had been deprived of the following substantial rights:

(1) They had been deprived of the *use* of their money. (The trial court ruled that purchasers would have even the interest.)

(2) They had been deprived of their contractual remedy for the breach of their contract—repossession of the business.

(3) They had been deprived of an available remedy for wrongful attachment under Iowa law.

(4) They had been deprived of adequate security for sequestration of funds as provided by Iowa law.

(5) They had been deprived of the right under the Iowa law of attachment to require United Forest to state, under penalty of damages, its grounds for attachment.

(6) They had been deprived of the profits from their business which they could have realized on repossession.

Like Humpty Dumpty, there would be no way of putting the pieces together again if the appeal was postponed until the case is finally determined on the merits. If the appeal is dismissed as premature, and the case is successfully defended by the sellers, there could be no determination of the issue of damages in attachment since the district court

has ruled attachment does not control. On appeal, if the trial court is reversed on this issue (as the court of appeals has done), on remand to the trial court there are irreparable problems in trying the issue of damages for wrongful attachment:

> (1) No penalty bond has been filed for payment of damages and plaintiff is a no physical asset non-resident sales organization with very minor net worth. (R. 257)
>
> (2) Plaintiff-purchaser has stated no grounds for attachment as required by Iowa law.
>
> (3) Defendants-sellers have lost forever their right, as stated by the court of appeals, to have the court determine the maximum amount which may be attached. (A6, footnote 5)

The bond for attachment in Iowa is double the amount attached and there is no discretion in the court with respect to the amount or the necessity of filing the same. (A12, footnote 10)

The court of appeals recognized and identified the irreparable harm that could come to these complaining defendants in the following language:

> "If review of the court's authority to sequester funds were required to await appeal of the merits on protracted litigation, compliance with the Iowa law of attachment would come too late to assure protection of the defendants' property rights involved. In order to attach monies before judgment the Iowa Code requires (1) that in a non-contract action the amount attached must be approved by a court of competent jurisdiction, (2) that plaintiff demonstrate statutory grounds for such attachment, and (3) that a bond be required in an amount double the value of the property to be attached. The policy reasons behind these statutory provisions are self-evident. Under Iowa law the amount of the attachment bond was not left to the dis-

cretion of the trial judge. The legislature required a bond double the value of the property attached not only as protection to the property owner but undoubtedly as an added deterrent to those who seek to attach property upon a mere statement of a contingent claim. See discussion in n. 10, infra. Of particular significance is the prerequisite of judicial approval as to the amount to be attached in a tort action, as involved here. Under Iowa law a party cannot arbitrarily govern the amount attached by inflating the prayer for damages in the complaint. The value of the property attached must have some realistic relationship to the damages theoretically sustained." (A5-7)

"The effect of plaintiff's action here is to obtain a 'so-called injunction' for an action at law [After citing Justice Roberts in *Beers Consol. Mines* v. *U. S.*, 325 U.S. 212 at 222]. The situation is no different than if defendants were paid the monies directly and then were enjoined from 'disposing' of them until determination on the merits." (A11)

Plaintiff's action in retaining the business sold and depriving defendants of the consideration during pendency of the litigation would almost guarantee this ominous result (Bankruptcy). The law does not recognize such leverage in the hands of litigants." (A13)

The only fair conclusion is that irreparable injury was extensively covered by the court below.

Finally, petitioner urges that the case is not appealable because the action of the district court was discretionary. The court of appeals recognized and treated this issue squarely in the following language:

"The issue here is not one related to the proper exercise of the court's discretion as to the amount of security to be posted. The question which makes this matter reviewable is whether the law permits a trial court to circumvent the Iowa law of attachment al-

> together. A similar issue of review was involved in the *Cohen* case where the district court had refused to apply New Jersey law requiring security for costs in a stockholders derivative action. Cf., e.g., *Swift & Co. Packers* v. *Compania Colombiana Del Caribe*, 339 U.S. 684 (1950) (reviewed order vacating attachment); *Phelps* v. *Burnham*, 327 F. 2d 812 (2 Cir. 1964) (reviewed order requiring the posting of security); *McDonnell* v. *Birrell*, 321 F. 2d 946 (2 Cir. 1963) (reviewed order requiring party to make payments, to determine whether order conformed with requirements of state law)." (A7)

In conclusion, the *Cohen* rule has not resulted in a flood of interlocutory appeals. The "collateral issue" doctrine and "practical finality" rule have been carefully followed by the various courts of appeal. This case is the first case involving the applicability of state statute requiring security since *Cohen*, and was decided in the same way. The petition for writ of certiorari presents no issue for review by this court.

2. The issue of the power of a district court to allow a deposit in court does not present a question for review. Petitioner's attempt to create conflict on this issue is patently overreaching. The language is couched in terms of a conflict in decisions "emanating" from different circuits. (P. 19, Petition for Writ) The footnote cites only district court decisions. To this moment, no other court of appeals has decided this issue. There is no "conflict" between the circuits and no reviewable issue on this ground.

Petitioner further urges that this is an "important question of federal law" as further grounds for certiorari. How logical is this assertion when in all the years Rule 64 and Rule 67 have been in existence, not one known case has reached a court of appeals concerning their re-

lation, one to the other? The determination by the Eighth Circuit in this case is the first time in the history of the Rules a case was *appealed* to the court of appeals. This case presents an anomalous situation, one not likely to arise again, and is not one which requires the attention of this court from the myriad of extremely important issues facing it.

Finally, petitioner comes into this court with the bald assumption that it is an "inherent power" of the court to sequester monies without bond. Here again, the court of appeals carefuliy considered this unusual assertion and disposed of it. (A10)

3. Application for damages under Supreme Court Rule 56(4). On February 3, 1969, the court of appeals filed its opinion and since that date United Forest has used every conceivable device to prevent these complaining defendants from receiving disbursement of their funds pursuant to such order. First, rehearing was requested in the court of appeals, and upon denial, application for stay of mandate pending filing of this writ was made and granted.

In the meantime, these defendants have been restored to neither their rights or their remedy. The petition for writ of certiorari is frivolous and dilatory. In such circumstances, application of Rule 56(4) is particularly applicable:

> "4. Where a petition for writ of certiorari has been filed, and there appears to be no ground for granting such a writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay."

This is an appropriate case because this petition for writ has cost petitioner virtually nothing. No security has

been posted and the money on deposit is earning 5¼% to 5½% interest and contractual interest is only 6%. Some reasonable penalty for the lack of good faith in filing this petition for writ of certiorari should be extracted.

Conclusion. Petitioner has failed to demonstrate any grounds for review and the petition for writ of certiorari would appear to be totally without substance. Reference is made to conflicts in the circuits and important federal questions but, upon analysis, it is found that neither ground actually exists. No constitutional question is mentioned. In the circumstances, this case would appear to be the appropriate case for the extraction of reasonable damages for filing a petition for a writ as a delaying tactic.

Respectfully submitted,

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